

theless, basing on the authority of the Federal Court, as held by Azmi L.P. (as he then was) in *Lebai Taib v. Abdul Ghani & Anor.*⁽¹⁾ where a similar question arose, I hold that the oral agreement does not contradict, vary, or subtract from, nor add to, the terms of the document of transfer within the meaning of section 92 of the Evidence Act. It is a stipulation which is unconnected with the document and is therefore not an addition of the kind as envisaged by that section.

On the issue of facts, the relevant document of transfer, to my mind, should not be considered in isolation, because of the admission by both parties of the existence of the subsequent oral agreement. The surrounding facts and circumstances have to be taken into account in order to determine whose version is the true one, on the balance of probabilities. It seems to me, according to the plaintiff, the deceased was all the while under the impression that the portion in dispute (Lot 1438) was meant for a road reserve. From earlier correspondence between the solicitors (pages 3 & 5 of Exhibit A) regarding the disputed portion and the assurance from the defendant on December 3, 1965, the position was still the same, i.e. the portion was acquired by the Town Council, Sungai Patani for road construction. No answer was given by the defendant to the letter requiring the particulars of the land so acquired, etc. dated January 4, 1966. It is clear by that time the portion in dispute has already been transferred by the defendant to the two purchasers. (see page 7 of Exhibit A). Next in sequence of events was the letter to the District Officer, Sg. Patani dated June 21, 1966 and the reply from the late D.O. dated July 28, 1966 (pages 3 & 4 of Exhibit B). By that time the plaintiff's husband had come to know of the sale of the disputed portion and he requested the D.O. to arbitrate in the dispute between him and the defendant. The District Officer's letter in reply is self-explanatory.

I am satisfied from the above that the plaintiff's version as corroborated by material points is probable and reasonable, and I accept it as being true.

The defendant's next point was that because the Government has not taken up the portion in dispute (Lot 1438) as a road reserve but roads were constructed along the strips of land on both sides of the plaintiff's lot, he has a right to sell the disputed portion. That was never pleaded at all and was merely a lame excuse. If that was true, he ought to have informed the plaintiff earlier that he intended to dispose of it rather than to maintain that it was to be taken up for a road reserve. The defendant had told a lie. He was argumentative and difficult to control even by his counsel, while in the witness box. He kept changing his evidence and was very evasive.

I therefore give judgment for the plaintiff. The plaintiff is entitled to the alternative prayer for damages for breach of contract, since Lot 1438 has been sold by the defendant. With regard to compensation for 1561 sq. ft. being the area of the Lot, the present Government valuation would be between 80 cents to \$1 per sq. ft. but the market value would be twice or more. However, I took into consideration that the price was only \$5,500 for the whole area containing both Lots 1438 and 1439 as it was earmarked for a

A Chinese temple. In the circumstances, I would assess the value at \$1 per sq. ft. and the damages at \$1,560 as being fair and reasonable. With regard to the cost of the temporary building on Lot 1438, the expenses incurred by the plaintiff in dismantling it including the fencing and the cost for its reconstruction, I would assess it at \$4,000 as being reasonable in the absence of any documentary proof of the actual expenses. In all, the damages that the plaintiff is entitled to is \$5,560. The defendant has since been adjudged a bankrupt and is still undischarged. This judgment should therefore be relayed to the Official Assignee who is responsible for the defendant's estate.

Order accordingly.

C Solicitors: *Eugene Khoo & Co.*; *Albert S. Hoe & Co.*

CHIN YOON TIMBER CO. v. OVERSEAS LUMBER BHD.

D [O.C.J. (Syed Othman J.) April 17, 1978]
[Johore Bahru — Companies (Winding-Up) No. 4 of 1977]

Companies — Winding up — Petition to wind up company — Affidavit verifying petition sworn before the presentation of petition — Objections thereto — Second affidavit filed — Companies (Winding-Up) Rules, 1972, rr. 7(1), 26, 193 & 194.

E The petitioner presented a petition to wind-up the respondent company on May 17, 1977. The affidavit verifying the petition was sworn before the presentation of the petition. The respondent objected to the petition and the court allowed an adjournment. Thereafter, the petitioner filed another affidavit verifying the petition.

F Held: (1) the principle governing an affidavit is that it must be made in some cause or matter which is actually pending in the court;

(2) in this case there had been a disregard of the rules and therefore the petition should be struck out and a fresh petition should be filed.

Cases referred to:-

- G (1) *Re Western Benefit Building Society* (1864) 33 Beav 368.
(2) *Re The East Cambrian Gold Mining Co.* 12 L.T.R. N.S. 507.
(3) *Re The London and Westminster Co-operative Store Co.* 17 L.T.R. N.S. 559.

COMPANIES WINDING-UP.

Abdul Razak for the petitioner.

C. Paramjothy for the respondent.

H *Wong Kim Fatt* for the receivers & managers of the company.

Jaafar bin Mat Saman (Federal Counsel) for the Inland Revenue.

I **Syed Othman J.:** The petitioner presented a petition to wind-up the respondent company on May 17, 1977. But the affidavit verifying the petition was sworn on May 4 i.e. before the presentation of the petition. At the first hearing Encik Paramjothy, for the respondent, objected to the petition. I allowed adjournment to enable counsel on both sides to look up the authorities and argue further. The petitioner's side took the opportunity and filed another affidavit verifying the petition, which was sworn on March 12, 1978.

In the further arguments, Encik Paramjothy also objects to the second affidavit. He argues that neither affidavit complies with rule 26 of the Companies (Winding-Up) Rules, 1972 which reads:—

"Every petition for the winding-up of a company by the court shall be verified by an affidavit referring thereto. The affidavit in Form 7 shall be made by the petitioner or by one of the petitioners, if more than one, or, in the case the petition is presented by a corporation, by some director, secretary or other principal officer thereof, and shall be sworn after and filed within four days after the petition is presented, and the affidavit shall be prima facie evidence of the statements in the petition."

He says in effect the provisions are mandatory and not curable by rules 193 and 194 which read:

"193. The court may, in any case in which it shall see fit extend or abridge the time appointed by these Rules or fixed by any order of the court for doing any act or taking any proceedings.

194. (1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court.

(2) No defect or irregularity in the appointment or election of a receiver, liquidator, or member of a committee of inspection shall vitiate any act done by him in good faith."

Encik Abdul Razak, for the petitioner, argues that the defect is merely formal and curable under the Rules and at the same time applies to the court for extension of time. He refers to two authorities:

(1) *The English and Empire Digest* Volume 10 (1956 edition) paragraph 2567 (p. 888) which reads:

"2567. At what time sworn — Before presentation of petition — Where a verifying affidavit is sworn before, instead of after, the petition is filed, the court would probably get over the difficulty if that were the only ground of objection — *Re Sutherland Manure Co. Ltd.* [1893] N.Z.L.R. 460."

(2) *Re Western Benefit Building Society*⁽¹⁾ referred to in footnote 5 *Halsbury's Laws of England* Vol. 7 at page 611. The full text of the authorities was apparently not available to counsel.

I am unable to trace the full text of the New Zealand case. The note in the Digest does not show how the court could probably get over the difficulty.

The English authority, *Re Western Benefit Building Society*, appears in the English Reports Vol. 55 at page 409, case 368. In this case an order had been made to wind-up the company, but it was found that the affidavit in support of the petition had, inadvertently, been filed before instead of after the filing of the petition. The matter was brought to the notice of the court, and it was said that the error had arisen from the old practice, which was to annex the affidavit to the petition, and which therefore required it to be sworn before the filing of the petition. Reference was made to 12 & 13 Vict.c 108 section 3. The Master of the Rolls (Sir John Romilly) in a very short judgment said:

"This affidavit amounts to nothing; it must be resworn and the order dated subsequently."

I do not think rule 193 can be said to apply to the first affidavit, as the affidavit was conceived before the petition. The question of extension or abridgement, to which the rule relates, does not arise. The affidavit cannot therefore be said to relate to any proceedings. Extending what the Master of the Rolls

A said in the *Re Western Benefit Building Society*, you cannot verify to an unborn petition; a petition comes to life only when presented. The underlying general principle governing an affidavit is that it must be made in some cause or matter which is actually pending in the court.

B As regards the second affidavit, I must express concern with the course taken by the petitioner's side. No one could possibly be unaware that the matter was adjourned to enable both sides to look up the authorities to deal with the question as it stood. Anyway, the very fact that it was filed belies an admission that the first affidavit is bad. During the further arguments, counsel for the petitioner applied orally for extension of time. Encik Jaafar bin Mat Saman, Federal Counsel for the Inland Revenue Department, who supports this petition, has been good enough to refer me to 2 English cases where extension was granted. *Re The East Cambrian Gold Mining Co.*⁽²⁾ and *Re The London and Westminster Co-operative Store Co.*⁽³⁾ In the first case, the affidavit was filed a few days after the 4th day. In the second case, it was filed on the 5th day. In both cases the court granted enlargement of time. But in these cases, there had been attempts to file the affidavits within time and circumstances were shown why they could not be filed in time. Here, no explanation has been offered, and the application for extension is from May 17, 1977 to March 19, 1978, which I think is too long a period for an act required to be done within 4 days. Further, the application does not comply with rule 7(1), which reads:

"7. (1) Every application in court, other than a petition, shall be made by motion and shall be served on the party affected thereby not less than two days before the day named in the notice for hearing of the motion."

F From what I can see there has been a disregard of the rules. In the circumstances, I feel that the petition should be struck out, but I would allow a fresh petition to be filed. Costs to the respondent.

Petition struck out.

G Solicitors: Ong Ban Chai & Razak; Wong & Paramjothy; Allen & Gledhill.

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